IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 94 OF 2021

(Arising from Land Application No. 54 of 2018 from the District Land and Housing Tribunal for Maswa at Maswa)

KULWA MASHINI..... APPELLANT

VERSUS

KEFA IGENGE MAGESE.....RESPONDENT
(Administrator of the estate
of the late Manota Bupinga)

JUDGMENT

27th Sept & 7th Oct, 2022

V.M. NONGWA, J.

The appellant above named being aggrieved by the decision of the trial tribunal for Maswa District, filed an appeal against the said decision and orders on the following grounds which I reproduce as presented;

1. *'The learned chairman erred in law and fact by determining the matter without having requisite jurisdiction.*
2. *The learned chairman erred in law and in fact that the appellant's husband one Rajabu Mwanga was allocated the suit land since 1992 who kissed the dust in 2015 therefore the appellant has no locus stand to sue be sued on behalf of her late husband.*

3. *The learned chairman erred in law and in fact by failure to afford the appellant opportunity to cross examine the Exhibit P1 and the same was not read to the appellant.*
4. *The learned chairman erred in law and in fact by admitting the Exhibit P1 contrary to the requirement of the law.*
5. *The learned chairman erred in law and fact to disregard that the appellant claim only eight (8) of land while the respondent claims ten (10) of land.'*

The appellant prays before this honorable court for the following orders;

i. The appeal be allowed with cost
ii. The tribunals judgment and orders be declared nullity ab initio
iii. The matter be instituted before a competent machinery to try it

The back ground in a nutshell are that, the appellant Kulwa Mashini was sued by the respondent over a piece of land measuring 10 acres situated at Sisa hamlet, Nyangili village withini Busega District and Simiyu Region. The prayer by the Respondent at the Trial Tribunal was that the suit land is party of the estate of the late Petro Manota Bupunga and therefore the appellant was to be ordered to vacate from the suit land and was to be permanently restrained from trespassing the suit land.

From the records and testimonies from the two sides, the respondent having been appointed administrator of the estate of the Petro Manota Bupunga, alleged that the appellant invaded the land in the year 2011. On her side, the appellant averred that she was allocated the land by the village counsel in the year 1992. The trial chairman decided the matter in favour of the respondent, by then the applicant and ruled out

that the suit land belongs to the late Petro Manota Bupunga. Hence this appeal by Kulwa Mashini.

When this appeal was scheduled for hearing on special session, only the appellant appeared after waiting for the parties to appear till 13:35. That being the case, the matter proceeded for hearing the appellant after my reasoning that hearing expate would not prejudice the respondent who is the 2nd legal representative of the original respondent, the late Petrol Manota Bupinga.

At the hearing, Kulwa Mashini had nothing to say than praying that the reasons for appeal that she was helped to prepare and file be adopted as they are, and whenever the court finds any mistakes, help to correct the same. She said further that her husband died 2015, the land was given to the by the village committee. She has been living on the said land since 1992, her husband died left her there. That the land is 8 acres, the eight acres were allocated to her husband by the village committee. She prayed for the court to help her as she has been troubled for many years, she be given her right, justice be done.

Having heard the appellant, and considering that she is a layperson, she has tried her best to tell the court the reason for appealing, and wants justice to be done. I was much interested with the first ground of appeal, as to the jurisdiction of the trial tribunal and in particular. This made me go through court records including; parties' pleadings, assessors opinion and the proceedings of the court. I have noted that all the two assessors have acknowledged that this matter was once determined in favour of the appellant before the Igalukiro Primary court. So, the issue is whether the suit before the trial tribunal was barred by the doctrine of *res judicata.*

Let me acknowledge the position by my brother, his Lordship C. P. Mkeha, J. in **Felician Credo Simwela Vs Qu Am Ara Massod Battezy and another DC Civil Appeal No. 10 of 2020, High Court Sumbawanga** Registry; in which case he referred the cases of **Marwa Mahende v. Republic [1998] TLR 249** and **Hassan Ally Sandali v. Asha Ally, Civil Appeal No. 246 of 2019**, Court of Appeal of Tanzania at Mtwara (unreported). He stated that;

> *'It is not in dispute that, the appellate courts are enjoined to apply and interpret the law of the land and ensuring proper application of the laws by the court(s) below.'*

As I was asking myself where did the assessors got this information that the matter was determined way back in 1990s, I came to find that the pleadings in the written statement of defence by the appellant explains itself under second and 4th paragraphs, the WSD reads, and I quote;

2. *'That, the contents of paragraph 6 (a) (i) of the Application are strongly disputed in reasons that the said land is not the property of the late PETRO MANOTA BUPUNGA the applicant father rather the owner of the disputed land is one KULWA MASHINI, The respondent herein who acquired it legally in 1992 given by* ***Kamati ya Serikali ya Kijiji*** *and she has been living on the property since then to date despite of the applicant father claims it on Civil case No. 207/94 at Igalukiro Primary Court in 1994 and the matter ended up in favour of the respondent (copy of the Court registry and letter is hereby attached to form part of this application and Marked DW-1)*

4. *That, the contents of paragraph 6 (a) (iii) of the Application are strongly disputed in reasons that the respondent did not forcibly trespassed into a suit land since she was living on the suit property with her family since 1992 till to date. '*

The appellant, attached the copy of the court register and the letter from the Primary court of Igalukiro, showing the case number, *madai 207/94*

Manota Bupunga dhidi ya Kulwa Mashini, shauri; *madai ya ardhi eka 8,* the outcome of the case was '*mdai ameshindwa'* these contents are found in annexure DW-1 to the written statement of defence of the appellant, by then she was the Respondent. That is when the issue of Jurisdiction arises, as to whether the tribunal had mandate to determine the matter that had already been determined 27 years ago. The primary court magistrate, wrote a letter to the Tribunal on 3rd April 2019 informing the tribunal that the matter was conclusively determined way back in 1995 and the appellant won the case, and that letter is among the annexures in the written statement of defence. The assessors have acknowledged the fact that the appellant got the said land since 1992 as a piece of forest, with her husband they cleared the same and continued using it, that it was the village council that allocated the land to her.

It is unclear as to why the trial tribunal chairman did not bother to take judicial note on the fact that the decision of the Igalukiro Primary court delivered in 1995 over the same matter and rule that the application before him at trial tribunal was res judicata.

The assessors opined in consideration of the fact that the claim had been long time ago determined, at the time the deceased was still there, and he lost the case, the appellant continued to use her 8 acres till to the administrator of the estate of the late Manota appears to restart afresh a case that was well determined 27 years ago, before a competent court of law.

The Civil Procedure Code Cap 33, R.E 2019, provides inter alia;

> *'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same*

parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.'

It has been observed severally that for the doctrine of res judicata to apply the following conditions must be evidenced, these are; (i) the former suit must have been between the same litigating parties or between parties under whom they or any of them claim; (ii) the subject matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit either actually or constructively; (iii) the party in the subsequent suit must have litigated under the same title in the former suit; (iv) the matter must have been heard and finally decided; (v) that, the former suit must have been decided by a court of competent jurisdiction.

As reminded in the cases cited above, the rationale behind this principle is to guarantee finality of litigation and therefore to protect an individual from a multiplicity of litigation.

In the appeal at hand it shows clearly that the appellant was sued over the same matter way back in 1994 before the primary court of Igalukiro Bariadi, the case ended in her favour on 1995 as per records, the applicant the diseased at that time lost the claim over the same piece of land, he never appealed, the appellant continued to use the land for a long time until 27 years late the respondent who is administrator of the estate of the late Manota comes and re opens the suit before another tribunal. It cannot be possible to allow him to institute a separate suit that would contradict the former trial court's decision on the same issue.

This is due to the fact that, once the trial court reached its decision that the appellant was not at default, then the respondent was not entitled to claim ownership of the said 8 acres of land. The respondent was wrong to file a case against the appellant over the same issue that was decided by a court of competent jurisdiction 27 years ago. Clearly, matters should come to an end. As such I find the rest of the grounds redundant, this one issue jurisdiction is enough disposing this appeal.

Therefore, the above said elements of *res judicata* applies straight in the present matter where the appellant was originally sued in Civil case no. 207 of 1994 at Igalukiro Primary Court in Bariadi, (*Madai Na. 207/1994 Mahakama ya Mwanzo Igalukiro).* The appeal is thus allowed with costs, the judgment and orders of the trial tribunal are nullified.

It is so ordered.

Dated at Shinyanga this 7th October, 2022.

V.M. Nongwa
Judge
7/10/2022